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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 702

HARBOR TOWING CORPORATION,
Petitioner,

vs.

LUKE R. PARKER,
Owner of the
M/V "RUTH CONWAY"
and
SWIFT & COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

JOHN H. SKEEN,
JOHN H. SKEEN, JR.,
Proctors for Petitioner.

April 6, 1949

The Daily Record Co., Baltimore 3, Md.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Harbor Towing Corporation, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit rendered December 13, 1948, affirming a decree of the United States District Court for the District of Maryland dated April 6, 1948 (R. 121). That decree held petitioner's tug HUSTLER solely at fault for a collision with M/V RUTH CONWAY and denied petitioner limitation of liability claimed under R. S. Sections 4281-4285; 46 U.S.C.A. Sections 181-185. R. S.

Sec. 4285 was amended 49 Stat. 1480, 46 U.S.C.A. Sec. 185. Petitioner's defenses are that M/V RUTH CONWAY was at fault for the collision, together with tug HUSTLER and that Petitioner's claim for limitation of liability under Sec. 4283 should be granted.

JURISDICTION

Jurisdiction is based on Sec. 240(a) of the Judicial Code as amended, 28 U.S.C.A. sec. 347; new Federal Judicial Code Ch. 81, Sec. 1254(1).

OPINIONS BELOW

The District Court's opinion is found at R. 111 and is reported in 75 Fed. Supp. 514. No specific findings of fact or conclusions of law were made, but the final decree, R. 121, adopts the opinion as stating findings of fact and conclusions of law.

The opinion of the Court of Appeals is found at R. 154 and is reported in 171 Fed. 2d 416. The petition for rehearing (R. 161) was denied without opinion (R. 168).

SUMMARY STATEMENT

On the night of October 30, 1946, a collision occurred in the Chesapeake and Delaware Canal between Tug HUSTLER, towing barge No. 110 alongside, bound west, both vessels being owned by petitioner, a Maryland corporation and M/V RUTH CONWAY, bound east, owned by Luke R. Parker. The contact was between CONWAY and barge No. 110. CONWAY was damaged and became a total loss, together with her cargo of fertilizer owned by Swift & Company. The case was in admiralty tried to the Court without a jury.

CONWAY'S master had no pilot's license for the canal, her engineer had no license at all, and the vessel had no inspection certificate entitling her to carry goods for hire, as

she was doing. Parker, her owner, knew that these officers did not have licenses and that the vessel had no certificate (R. 4, 9-12); as to the engineer (R. 13, 24). Failure to have these papers is a violation by the vessel owner, Parker, of the applicable federal statutes, and the legal consequences of such violation are explained in our brief at page 18.

The District Court held tug HUSTLER solely at fault (R. Op. 117), barge No. 110 not at fault (R. Op. 113) and M/V RUTH CONWAY not at fault for the collision (R. Op. 117); and the decree (R. 121) is in accordance with the opinion.

Tug HUSTLER was held solely at fault on two grounds, (1) that she had moved too far to her left and over the center of the channel (R. Op. 114, 116) and that she failed to sound the danger signal (R. Op. 114, 115).

M/V RUTH CONWAY was exonerated because the District Court found (without any discussion of the evidence) that there was shown no fault on her part that contributed to the collision (R. Op. 117), citing the *Victory-Plymothian*, 168 U. S. 410 at 423. The District Court found that failure of the master of M/V RUTH CONWAY to have the required license was not a factor that contributed in any sense to the collision (R. Op. 113). The District Court did not mention and made no finding as to the unlicensed engineer or the absence of the certificate required for the vessel to carry cargo for hire.

The District Court and the Court of Appeals both ignored the uncontradicted evidence that not only did M/V RUTH CONWAY'S master not have the required license, but that the engineer had none and that the owner did not have the license required of vessels carrying goods for hire. As explained in our brief, this Court has decided that an owner operating a vessel in violation of applicable federal statutes has the burden of proving that the violations did not or

could not have contributed to fault in collision. This burden was not met in this case.

Smith, master of tug HUSTLER did not have a license, but the District Court found that Diesel engine tugs in this kind of service are not required by any law or regulation to have a licensed master (R. Op. 118).

Petitioner, Harbor Towing Corporation, duly filed its petition for limitation of liability under R. S. Sec. 4285 and complied with the requirements thereof, and claimed the benefits of R. S. Sec. 4283. The text of these statutes is printed in Appendix to our brief at page 23.

The District Court denied the limitation prayed for, on two grounds, (1) that the weight of the credible evidence showed that Smith, master of tug HUSTLER, was not fully competent for the work in hand and (2) that a more powerful tug than HUSTLER was required (R. Op. 120) and while not finding that the owner had any personal or actual knowledge of either of these circumstances, nevertheless, found that the owner should have known them on the ground of "imputed" knowledge.

As we show in our brief at pages 11-13 neither of these findings was sustained by the evidence; but the serious and glaring errors, both of law and fact, in the disposition of the case below arise from the use of the fiction of imputation to charge the vessel owner, who had no actual knowledge, with imputed or constructive knowledge resulting in denial of limitation.

The Court of Appeals affirmed (R. Op. 154).

QUESTIONS PRESENTED

1. Where no actual knowledge or privity of any officer of a corporate vessel owner, of specific acts of negligence (errors of navigation) of tug captain causing collision, is

shown, may knowledge or privity of such acts be legally and justly imputed to such officer, so as to result in denial of limitation of liability under R. S. Sec. 4283(a), 46 U.S.C.A. Sec. 183?

2. Did District Court and Court of Appeals err in misinterpreting and misapplying the words "without the privity or knowledge" of the vessel owner, as used in the limitation of liability statute R. S. Sec. 4283(a), 46 U.S.C.A. Sec. 183?

3. Did the District Court err in finding as a conclusion of law, that M/V RUTH CONWAY was free from fault for the collision, where the vessel owner admitted that the said vessel was operated without the required licensed officers and certificate, in violation of federal statutory requirements?

4. Did the District Court have any evidence whatever before it supporting the decree denying limitation of liability?

5. Did the District Court make any valid findings of fact or conclusions of law supporting the decree denying limitation of liability?

REASONS FOR GRANTING THE WRIT

1. The case involves the construction of R. S. Sec. 4283(a) of the limitation of liability law, which is an admiralty statute of general application to the whole shipping interest of the country; in that the words "privity or knowledge" are wrongly interpreted and wrongly applied. This is an important question of federal statute law which has not been but should be settled by the Supreme Court. *Coryell v. Phipps*, 317 U. S. 406; *La Bourgogne*, 210 U. S. 95, 122; *Richardson v. Harmon*, 222 U. S. 96, 103; 3 Benedict, Admiralty, 6 Ed. Secs. 489, 490.

2. The case concerns "important issues in the administration of admiralty law," as this Court said in *Black Diamond S.S. Corporation v. Robert Stewart and Sons, Ltd., et al*, and *United States of America v. Same*, October Term, 1948, Numbers 121 and 130, and for which reason certiorari was granted by this Court in those cases.

3. The case involves the decision of a federal question probably in conflict with applicable decisions of the Supreme Court, in that this Court has construed the words "without the privity or knowledge of such owner" to mean that without any actual knowledge of an owner, knowledge may not be "imputed" to such owner. 3 Benedict, Admiralty, 6 Ed. Sec. 490 at pp. 393, 394, citing *The G. K. Wentworth, and The Maine*, 67 Fed. 2d 965 (C.A. 9th); *The Fred C. Smartley, Jr.*, 1937 A.M.C. 1558 (E.D. Va.); *The Ouimack*, 1931 A.M.C. 1933 (D. Conn.); *The North Star*, 3 Fed. 2d 1010 (D. Mass.); *The Walter A. Luckenbach*, 4 Fed. 2d 551, affirmed 14 Fed. 2d 100 (C.A. 9th).

4. The case involves a decision contrary to the uniform declarations of policy by the Supreme Court as to the manner in which the limitation of liability law must be administered. *Coryell v. Phipps*, 317 U. S. 409, 411; *Providence and N. Y. S.S. Co. v. Hill Manufacturing Co.*, 109 U. S. 578, 589; *Just v. Chambers*, 312 U. S. 383, 385; *Larsen v. Northland Transp. Co.*, 292 U. S. 20, 24; *Flink v. Paladini*, 279 U. S. 59, 62; *Richardson v. Harmon*, 222 U. S. 103; *Valliant v. Rayonier Inc.*, 140 Fed. 2d 589 (C.A. 4).

5. The case involves the failure of both the District Court and Court of Appeals to apply and enforce federal statutes relating to licensed officers and inspection of vessels, in that a vessel operated in admitted violation of said statutes was held free from fault in a collision case. *The Pennsylvania*, 19 Wall. 125, 136; *The Martello*, 153 U. S. 64, 76; *The City of Baltimore*, 282 Fed. 490 (C.A. 4), Same case, D. C. 275

Fed. 490, 495; *The Eagle Wing*, 135 Fed. 826, affirmed 162 Fed. 882 (4 C.A.), cert. den. 212 U. S. 580; *The Walter D. Noyes*, (D.C.), 275 Fed. 690, 694.

Wherefore the Petitioner prays that this Court issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit directing it to send to this Court for review a full transcript of the record and of the proceedings in the case numbered and entitled on its docket "No. 5789, Harbor Towing Corporation, Claimant-Respondent v. Luke R. Parker, Owner of M/V "RUTH CONWAY" and Swift & Company", and that the decision of the said United States Court of Appeals, and of the United States District Court for the District of Maryland be modified by holding the M/V "RUTH CONWAY" at fault, and by granting limitation of liability to Harbor Towing Corporation, owner of Tug "HUSTLER", Petitioner; with costs; and for such other and further relief in the premises as may be just.

Dated Baltimore, Maryland, April 6th, 1949.

HARBOR TOWING CORPORATION,

By: JOHN H. SKEEN,

JOHN H. SKEEN, JR.,
Proctors.

CERTIFICATE

We hereby certify that we have examined the foregoing petition, that in our opinion it is well founded and entitled to the favorable consideration of the Court, and that it is not filed for the purpose of delay.

JOHN H. SKEEN,

JOHN H. SKEEN, JR.,
Proctors.

Baltimore, Maryland
April 6, 1949

1508 First National Bank Bldg.,
Baltimore 2, Maryland.

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BRIEF IN SUPPORT OF PETITION

FIRST POINT

THE DECISIONS BELOW INVOLVE THE CONSTRUCTION OF R. S. SECTION 4283(a) OF THE LIMITATION OF LIABILITY LAW, WHICH IS AN ADMIRALTY STATUTE OF GENERAL APPLICATION TO THE WHOLE SHIPPING INTEREST OF THE COUNTRY; IN THAT THE WORDS "PRIVITY OR KNOWLEDGE" ARE WRONGLY INTERPRETED AND WRONGLY APPLIED. THIS IS AN IMPORTANT QUESTION OF FEDERAL STATUTE LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THE SUPREME COURT.

The pertinent part of R. S. Section 4283 and Section 4285 are printed in an Appendix to this Brief.

We are concerned here with Sec. 4283 and particularly the construction of the words "without the privity or knowledge of such owner or owners".

The injustice in denying limitation lies in the fact that it is evident from the opinions of both the District Court and Court of Appeals that neither Court gave due consideration to the law and the evidence or lack of evidence on this point. The District Court (R. Op. 117) quoted the *Calvert*, 37 Fed. 2d 355, at page 363. "The word 'privity' of the owner, as used in the (limitation of liability) statute, means some fault or neglect in which the owner personally participates. The word 'knowledge', as used, means some personal cognizance, or means of knowledge, of which the owner is bound to avail himself, of a contemplated loss, or of a condition of things likely to produce or contribute to a loss, without adopting appropriate means to prevent it." This is quoted from the Circuit Court opinion in *Lord v. Goodall*, 15 Fed. Cas. 884, No. 8506, aff. 102 U. S. 541. The passage from *Lord v. Goodall* not quoted by the District Court continues at page 887: "There must be some personal concurrence, or some fault or negligence on the part of the owner himself, or in which he personally participates, to constitute such privity, within the meaning of the act, as will exclude him from the benefit of its provisions. 113 Mass. 499." "The definition is frequently quoted or cited," 3 Benedict Admiralty, 6th Ed. p. 379. The most recent case in this Court is *Coryell v. Phipps*, 317 U. S. 406, 411 in which this Court said "In the case of individual owners it has been commonly held or declared that privity as used in the statute means some personal participation of the owner in the fault or neglect, which caused or contributed to the loss or injury" (citing authorities including *La Bourgogne, Deslions v. La Compagnie Generale Transatlantique)*, 210 U. S. 95, 122, which held that "mere negligence does not necessarily establish existence on the part of the owner of 'privity or knowledge'." *La Bourgogne* was followed on this point in *The Virginia* (D. C.) 264 Fed. 986,

affirmed 278 Fed. 877, by the Court of Appeals Fourth Circuit.

The decisions below are therefore in conflict with both *Lord v. Goodall, supra,* and *Coryell v. Phipps, supra,* as to the interpretation of privity or knowledge; since neither Court found, as to "knowledge" any personal cognizance of the owner, or means of knowledge; nor as to "privity" some personal concurrence, or some fault or negligence on the part of the owner himself, or in which he personally participated.

Nor did the decisions below consider, as shown by the opinions, that even the privity or knowledge wrongly imputed to the owner of the tug, could have possibly amounted to anything more than "mere negligence", which under the language quoted above from *La Bourgogne,* does not justify a finding of privity or knowledge. The utmost that can be said of the owner's conduct is that he sent out on the job a master, tug and barge which had done the same job properly and safely many times before, with no knowledge or reasonable expectation that it could not properly be done. There is no suggestion of even negligence in the operation. Then when an accident occurs, it is said, long after the event, that the master was incompetent, the tug too small, and that the owner knew at the time or had reason to know these things. The libelant had the burden of proving this; and failed completely to do so.

The District Court denied limitation on two grounds (R. Op. 117-120) (1) that the master of the HUSTLER was incompetent and (2) that tug HUSTLER had been proven by testimony not to have had sufficient power to handle the barge under the conditions of the voyage.

On a question of this kind this Court has always examined the evidence. As was said in *La Bourgogne, supra,* page

119, "the fault on the part of the vessel being established, it is necessary, before considering the contention that there was privity and knowledge on the part of the petitioner, to develop the nature and character of acts which would constitute privity and knowledge within the intendment of the law relating to limitation of liability of ship owners." There was no affirmative evidence in the present case as to the incompetence of the master and therefore no factual basis for such a finding by the District Court. After finding that Diesel engine tugs (as HUSTLER was) are not required by law or regulation to have a licensed master (R. Op. 118) the District Court stated the legal proposition that "if such a tug does not have a licensed master in command of her, *a heavier burden rests upon her owner when faced with a situation such as the facts in this case disclose*". (Italics supplied.) The District Court cites no authority for this nor can any be found; yet apparently it entered into the Court's later holding charging the owner with knowledge or privity of the master's incompetence. The District Court found the master incompetent because of the Court's "impression" that the master "while an honest man, * * * was grossly lacking in knowledge of the Inland Rules of Navigation" (R. Op. 119). Clearly the finding of incompetency rests only on the District Court's belief that ordinary errors of navigation by the master in an emergency at the time of collision plus the Court's impressions about the master's technical knowledge constitute incompetance. But impressions and beliefs are not evidence.

The second ground on which the District Court denied limitation was that tug HUSTLER had been proven by testimony not to have had sufficient power to handle the barge under the conditions of the voyage (R. Op. 118). The testimony referred to was that of an expert witness (Cullison) (R. 24-32; 102). This man had never worked

on the Hustler (R. 30), had never towed barge No. 110 through the C. & D. Canal, but had towed her twice in Baltimore harbor with tugs of larger horsepower than the HUSTLER, though when and under what conditions he was unable to say (R. 32). Over repeated objections he was allowed to express an opinion that a tug of not less than 400 horsepower would be required for the job (R. 31), the HUSTLER being 210 horsepower. On this "evidence" alone, the District Court found that the tug owner, "even if they did not actually know, should have known, and, therefore, are charged with the duty of knowing, that a more powerful tug was the only appropriate one to use for safe navigation under the circumstances" (R. 118).

It was of course necessary to *prove* that the owner had knowledge or privity; and the grievous error and injustice of the conclusion is that the District Court, finding that the owner had no actual knowledge, baldly charged the owner with constructive or imputed knowledge without any evidence whatever that the owner knew or had any reason to know or suspect that the tug did not have sufficient power. The District Court's conclusion is flatly in contradiction of its own subsequent finding that "We are not unmindful of the fact that this same tug and tugs of a similar type, with similar personnel, and towing barges of a similar type and with similar cargo have gone successfully through this canal. But this is not conclusive in the present case" (R. 119).

How can the owner be justly charged with knowledge or privity in the face of the uncontradicted evidence that he had owned the barge and tug for eight or nine years, that the tug and barge had made frequent trips through the canal safely under all conditions without any difficulty in the tug controlling the barge, and the evidence of the

Master and Mate of the tug to the same effect? (R. 86, 87, 90, 92, 71, 77, 49).

The error which calls for review is the wrongful imputation of knowledge and privity of the owner upon the record in this case.

Point II

THE CASE CONCERNS "IMPORTANT ISSUES IN THE ADMINISTRATION OF ADMIRALTY LAW", AS THIS COURT SAID IN ITS OPINION IN *BLACK DIAMOND SS CORPORATION VS. ROBERT STEWART & SONS, LTD. ET AL* AND *UNITED STATES OF AMERICA VS. SAME*, OCTOBER TERM, 1948, NUMBERS 121 AND 130; AND FOR WHICH REASON CERTIORARI WAS GRANTED BY THIS COURT IN THOSE CASES.

It seems obvious that the questions here presented are equally as, and probably more, important than the issues in the Black Diamond SS Corporation case. There the question was as to the amount of bond to be given to release a vessel whose owner had petitioned for limitation of liability. In the case at bar the questions are the proper interpretation of the most important phrase of R. S. Sec. 4283 and the application thereof, and the construction and application of federal statutes of a general nature relating to the operation of vessels. The questions affect the whole shipping interest of the United States; and the decision unsettles the law. If the decisions stand, vessel owners are exposed to a denial of a limitation in any case where a master is found negligent in errors of navigation, to charges of the master's incompetence based only on such errors, and without actual knowledge, to the imputation of knowledge or privity of the master's incompetence to the vessel owner. As to the license situation (see Point V), if the decisions stand, vessel owners will be encouraged to operate their vessels without proper licensed personnel

and in defiance of the federal statutes in the hope that they can get away with it, as in this case the owner of M/V RUTH CONWAY has so far done.

Point III

THE CASE INVOLVES THE DECISION OF A FEDERAL QUESTION PROBABLY IN CONFLICT WITH APPLICABLE DECISIONS OF THE SUPREME COURT, IN THAT THIS COURT HAS CONSTRUED THE WORDS "WITHOUT THE PRIVITY OR KNOWLEDGE OF SUCH OWNER" TO MEAN THAT WITHOUT ANY ACTUAL KNOWLEDGE OF AN OWNER, SUCH PRIVITY OR KNOWLEDGE MAY NOT BE IMPUTED TO SUCH OWNER.

The decisions below declare the law to be that where a vessel owner has no actual knowledge of the facts and circumstances of a collision, knowledge and privity within the meaning of those words as used in Sec. 4283 may nevertheless be imputed to him, and limitation of liability denied. The Supreme Court has never so decided. In *Coryell v. Phipps*, 317 U. S. 411, the Court said "and even were we to assume without deciding that for the purposes of Sec. 4283 privity as well as knowledge of an individual owner may be constructive rather than actual, it does not follow that Phipps should be barred from limiting his liability".

The District Court gave as its reason for imputing knowledge or privity of the negligence of the master to an officer of the corporate owner, that, while as the District Court found, it was lawful for a Diesel tug of this type to be navigated by persons not holding any license (R. Op. 119-120)" * * * the fact that the master did not have a license explains in part, at least, why he did not have, ready at hand, the knowledge which having such a license presupposes,—knowledge which the law with respect to safe navigation requires that a tug boat master shall *always* possess and use. (Italics Court.) *Therefore, this serious lack on*

the part of the master must be imputed to the tug's owner * * *" (Italics supplied.) This is saying that although the tug was being legally operated, the owner is to be charged with knowledge or privity of the District Court's finding of the master's incompetence based on errors of navigation.

The District Court gives no reason for imputing knowledge or privity, and refers to no evidence to sustain its conclusion that knowledge or privity "must be imputed to the tug's owner". The District Court opinion states no factual or legal basis or reason for the imputation. An essential step is omitted; there is no finding of any facts or reasons why the owner should be charged with knowledge or privity, as to the Master's errors of navigation.

Benedict Admiralty, 6th Ed. p. 393, states "* * * and no case has been found where a ship owner, individual or corporate, has been denied limitation because of a liability arising out of an error of management or of navigation on a voyage committed by an employee whom the owner was warranted in believing to be competent with knowledge of his duties. Citing: *The G. K. Wentworth, and The Miane,* 67 Fed. 2d 965 (C. A. 9th); *The Fred C. Smartley, Jr.,* 1937 A. M. C. 1558 (Ed. Va.); *The Ouimack,* 1931 A. M. C. 1993 (D. Conn.); *The North Star,* 3 Fed. 2d 1010 (D. Mass.); *The Walter A. Luckenbach,* 4 Fed. 2d 551, affirmed 14 Fed. 2d 100 (C. A. 9th).

No authority is cited by the District Court for the imputation referred to. The Court of Appeals cites the *Calvert,* 37 Fed. 2d 335, 364, modified 51 Fed. 2d 494; *Eastern SS Corp. v. Great Lakes Dredge and Dock Co.,* 256 Fed. 497, 504; *McGill v. Michigan SS Co.,* 144 Fed. 788, 795, cert. den. 203 U. S. 593 (R. Op. 157, 158). In our petition for rehearing (R. pp. 164-165) we pointed out why these cases do not sustain the imputation of knowledge or privity in the

present case. The question here is entirely different from those cases. *In the present case the attempted imputation creates knowledge or privity of an officer of the corporate owner. The cases cited by the Court of Appeals relate to the imputation of actual knowledge or privity of a corporate supervisory officer, to the corporation.* This Court pointed out the distinction in *Coryell v. Phipps*, 317 U. S. 410. We submit that the present decisions are in conflict with the decisions of this Court and other courts of high authority which have uniformly held that privity or knowledge must be actual and not merely constructive. *Coryell v. Phipps*, 317 U. S. 411; *La Bourgogne*, 210 U. S. 95, 122; *Richardson v. Harmon*, 222 U. S. 96, 103; *The 84-H*, 296 Fed. 427, 431, (C. A. 2); *The Mattie*, 38 Fed. Sup. 745, 748, affirmed 136 Fed. 2d 904 (C. A. 2); *The Southcoast*, 71 Fed. 2d, 891, 894 (C. A. 9); *The Marguerite*, 140 Fed. 2d, 941 (C. A. 7) and 3 Benedict, Admiralty, 6th Ed. p. 379, where it is stated:

> "But the language of the cases usually speaks of the ship owner as an individual; and when the owner is in fact a corporation, the references to the individual ship owner must, by a process of dislocation, be read to refer to the managers of the corporate enterprise who are vested with discretion and authority."

POINT IV

THE CASE INVOLVES A DECISION CONTRARY TO THE UNIFORM DECLARATIONS OF POLICY BY THE SUPREME COURT AS TO THE MANNER IN WHICH THE LIMITATION OF LIABILITY LAW MUST BE ADMINISTERED.

Coryell v. Phipps, 317 U. S. 411

> "That construction stems from the well settled policy to administer the statute not 'with a tight and grudging hand' (Mr. Justice Bradley, in *Providence and N. Y. S. S. Co. v. Hill Mfg. Co.*, 109 U. S. 578, 589) but 'broadly and liberally' so as 'to achieve its purpose to encourage

> investments in shipbuilding and to afford an opportunity for the determination of claims against the vessel and its owner'. *Just v. Chambers*, 312 U. S. 383, 385. And see *Larsen v. Northland Transp. Co.*, 292 U. S. 20, 24. *Flink v. Paladini*, 279 U. S. 59, 62; *Richardson v. Harmon*, (222 U. S. 96, 103)."

The further observations of Justice Bradley in *Providence v. Hill* are pertinent. At 109 U. S. p. 589, the Court says:

> "If the Courts having the execution of it administer it in a spirit of fairness, with the view of giving to shipowners the full benefit of the immunities intended to be secured by it, the encouragement it will afford to commercial operations, as before stated, will be of the last importance; but if it is administered with a tight and grudging hand, construing every clause most unfavorably against the ship-owner, and allowing as little as possible to operate in his favor, the law will hardly be worth the trouble of its enactment."

These principles were adopted and approved by the Court of Appeals, Fourth Circuit, in *Valliant & Co. v. Rayonier, Inc.*, 140 Fed. 2d 589. The same Court which decided the case at bar, completely overlooked or disregarded the principles which it had itself declared. The present decisions are certainly contrary to the definite policy of the administration of the limitation of liability law.

Point V

THE CASE INVOLVES THE FAILURE OF BOTH THE DISTRICT COURT AND COURT OF APPEALS TO APPLY AND ENFORCE FEDERAL STATUTES RELATING TO LICENSED OFFICERS AND INSPECTION OF VESSELS, IN THAT A VESSEL OPERATED IN ADMITTED VIOLATION OF SAID STATUTES WAS HELD FREE FROM FAULT IN A COLLISION CASE.

R. S. Section 4438 (46 U. S. C. A. Section 224) entitled "Licenses of officers by inspectors" and R. S. Section 4426

(46 U. S. C. A. Section 404) entitled "Inspection of ferry boats, canal boats, and small craft; regulation; licenses" are printed so far as material here in the appendix.

It is noted that R. S. 4438 provides for licensing of masters, engineers, pilots, etc. "of all *steam* vessels", (Italics supplied) and does not have any reference to Diesel powered vessels. The United States Coast Guard now charged with the duty of issuing and supervising licenses does not require masters, engineers, and pilots of Diesel powered vessels to have licenses. This section exempts tug HUSTLER from any requirement as to licensed officers and would also exempt the CONWAY from such requirements, except for the provisions of R. S. 4426.

R. S. 4426 however provides that "* * * all vessels of above fifteen gross tons carrying freight or passengers for hire propelled by gas, fluid, naphtha or electric motors shall be subject to the provisions of this section relating to the inspection of hulls and boilers and requiring engineers and pilots * * *" The CONWAY was a Diesel powered vessel of above fifteen gross tons carrying freight for hire. The section therefore required her to have at least two licensed officers, a pilot and an engineer. She had neither licensed officers nor did she have the required certificate of inspection all of which was known to her owner. In short, the difference between the CONWAY and the HUSTLER as to licensed officers is that the CONWAY was carrying goods for hire and comes within the requirements of R. S. 4426 while tug HUSTLER not carrying goods for hire does not.

Where a statute requires that certain officers of a vessel must be licensed it has been held "The duty to observe this statute is imperative, and all must respect it whether they approve of its wisdom or not; but that it is founded upon the highest considerations of the laws of humanity, looking

to the safety of life and limb and the preservation of property, goes without saying." *The Eagle Wing*, 135 Fed. 826, (D. C. Va. 1905) affirmed C. A. 4, 162 Fed. 882, and cert. den. 212 U. S. 580.

In *Pennsylvania v. Troop*, 19 Wall. 125 (1874) this Court said:

> "But when, as in this case, a ship at the time of collision *is in actual violation of a statutory rule* intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests on the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute." (Italics supplied.)

The fault in this case was ringing a bell as a fog signal instead of sounding a fog horn as required by the statutory rule.

In *Martello v. Willey*, 153 U. S. 64, 74, this Court said:

> "There can be no doubt that the *Willey* was guilty of a statutory fault of failure to provide herself with the fog horn described by the international regulations and the presumption is that this fault contributed to the collision. *This is a presumption which attends every fault connected with the management of the vessel and every omission to comply with a statutory requirement, or with any regulation deemed essential to good seamanship.*" (Italics supplied.)

and cited *Pennsylvania v. Troop*, supra, and quoted a part of the passage quoted above in that case.

In *The City of Baltimore*, 282 Fed. 490 (C. A. 4, 1922), the same Court whose decision is here criticized, held a

vessel at fault in a collision case for failure to have a licensed master in charge and cited the *Pennsylvania*, the *Martello*, and the *Eagle Wing*, supra. But in the consideration of the present case both the District Court and the Court of Appeals ignored or overlooked both the *City of Baltimore* and the *Eagle Wing* which are binding authorities. The only reference to lack of license in the District Court's opinion is "* * * We feel that this failure on the part of the RUTH CONWAY'S master to have the necessary license, was not a factor that in any sense contributed to the collision" (R. Op. 113). The Court of Appeals did not mention the lack of licenses at all. The evidence as to lack of license was uncontradicted, the decisions below are flatly in conflict with the decisions of the same Court of Appeals on the same point and we submit that this situation justifies review and correction by the Supreme Court.

Last Point

IT IS RESPECTFULLY SUBMITTED THAT THE WRIT OF CERTIORARI PRAYED FOR SHOULD BE GRANTED, AND THAT THE DECISION OF THE UNITED STATES COURT OF APPEALS, FOURTH CIRCUIT, AND OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND BE MODIFIED BY HOLDING THE M/V "RUTH CONWAY" AT FAULT, AND BY GRANTING LIMITATION OF LIABILITY TO HARBOR TOWING CORPORATION, OWNER OF TUG "HUSTLER", PETITIONER, WITH COSTS.

John H. Skeen,
John H. Skeen, Jr.,
Proctors for Petitioner.

April 6, 1949

APPENDIX TO BRIEF

Limitation of Liability Law

R. S. Sec. 4283(a), 46 U.S.C.A., Sec. 183.—The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

R. S. Sec. 4285, 46 U.S.C.A., Sec. 185.—The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter, as amended, and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 4283, as amended, or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 4283, as amended. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease.

Pertinent Statutes Requiring Licensed Officers and Inspection of Vessels

R. S. 4438, 46 U.S.C.A., Sec. 224.—Licenses of officers by inspectors. The boards of local inspectors shall license and classify the masters, chief mates, and second and third mates, if in charge of a watch, engineers, and pilots of all steam vessels, and the masters of sail vessels of over seven hundred gross tons, and all other vessels of over one hundred gross tons carrying passengers for hire. It shall be unlawful to employ any person or for any person to serve as a master, chief mate, engineer, or pilot of any steamer or as master of any sail vessel of over seven hundred gross tons or of any other vessel of over one hundred gross tons carrying passengers for hire who is not licensed by the inspectors; and anyone violating this section shall be liable to a penalty of $100 for each offense. (R. S. Sec. 4438; Dec. 21, 1898, c. 29, Secs. 1, 30, Stat. 764; Jan. 25, 1907, c. 398, 34 Stat. 864; May 28, 1908, c. 212, Sec. 2, 35 Stat. 425.)

R. S. 4426, 46 U.S.C.A., Sec. 404.—Inspection of ferryboats, canal boats, and small craft; regulations; licenses. The hull and boilers of every ferryboat, canal boat, yacht, or other small craft of like character propelled by steam, shall be inspected under the provisions of this chapter. Such other provisions of law for the better security of life as may be applicable to such vessels shall, by the regulations of the Board of supervising inspectors, also be required to be complied with before a certificate of inspection shall be granted, and no such vessel shall be navigated without a licensed engineer and a licensed pilot: *Provided, however,* * * * All vessels of above fifteen gross tons carrying freight or passengers for hire, * * * propelled by gas, fluid, naptha, or electric motors shall be subject to all the provisions of this section relating to the inspection of hulls and boilers and requiring engineers and pilots * * *.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 702

HARBOR TOWING CORPORATION,
Petitioner,

vs.

LUKE R. PARKER,
Owner of the
M/V "RUTH CONWAY"
and
SWIFT & COMPANY,
Respondents.

BRIEF ON BEHALF OF RESPONDENT LUKE R. PARKER OWNER OF M/V RUTH CONWAY IN OPPOSITION TO PETITION

GEORGE W. P. WHIP,
Counsel for Respondent,
Luke R. Parker.

The Daily Record Co., Baltimore 3, Md.

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This brief is filed in opposition to a Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit which affirmed the decision of the United States District Court for the District of Maryland. The District Court's opinion is reported in 75 F. Supp. 514 and will be found in the record at page 111. The opinion of the Court of Appeals will be found in 171 F. (2) 416 and on page 154 of the record.

I.

DISCUSSION OF THE FIRST FOUR POINTS OF PETITIONER'S BRIEF WHICH CONCERN THE INTERPRETATION OF "PRIVITY OR KNOWLEDGE" AS USED IN THE LIMITATION STATUTES

The first four points in Petitioner's brief concern privity or knowledge as used in the limitation statutes. Petitioner complains that the decision of the District Court which was affirmed by the Court of Appeals was in conflict with this Court's decisions, particularly its decision in *Coryell v. Phipps*, 317 U. S. 406, 87 L. Ed. 363, 63 S. Ct. 291, in respect thereto.

The District Court saw and heard all of the witnesses including Mr. George E. Rogers, President and General Manager of Harbor Towing Corporation, the Petitioner (Rogers R. 80, 103). Among other things, the Court held that the tug HUSTLER was solely at fault for the collision, that her master had no license, was incompetent and grossly lacking in knowledge of the inland rules of navigation and that the weight of the credible evidence showed that Petitioner should have known that the tug's master was not fully competent for the work in hand. The Court held further that the tug HUSTLER was of insufficient power to tow the Barge No. 110 and that Petitioner should have known that a more powerful tug was required (Opinion R. 118-120). In affirming the District Court, the Court of Appeals said, "The incompetency of Captain Smith is clearly demonstrated and on the record before us there was ample ground for imputing knowledge of this incompetency to Harbor Towing Corporation", and that "Strong credence of the lack of power on the part of the tug HUSTLER to handle properly the barge on the trip through the canal is lent by the whole picture of the facts surrounding this collision" (Opinion R. 157-158).

In *Coryell v. Phipps, supra,* this Court held that the burden of proving lack of privity or knowledge is upon him who is seeking the benefit of the limitation statutes, that privity like knowledge turns on the facts of particular cases and that the concurrent findings by two courts in respect to such matters would be accepted by the Supreme Court. And see *Just v. Chambers,* 312 U. S. 385, 85 L. Ed. 906, 61 S. Ct. 687.

The following cases are pertinent.

McGill et al. v. Michigan S.S. Co. et al., 144 F. 788 (C.C.A. 9th) cert. den. 27 S. Ct. 782, 203 U. S. 593, 51 L. Ed. 332;

Eastern S.S. Corporation v. Great Lakes Dredge & Dock Co., 256 F. 497 (C.C.A. I), cert. dism., 40 S. Ct. 8, 250 U. S. 676, 63 L. Ed. 1202;

The SEVERANCE, 152 F. (2) 916 (C.C.A. 4), cert. den., 328 U. S. 853, 90 L. Ed. 1626.

II.

DISCUSSION OF THE FIFTH POINT OF PETITIONER'S BRIEF

In the fifth point of Petitioner's brief, Petitioner complains that both the District Court and the Court of Appeals failed to enforce statutes relating to licensed officers. But this is not a criminal or disciplinary proceeding. It is a civil suit in Admiralty for damages and Captain Dorman, master of the CONWAY, was a competent and experienced master with an excellent reputation who had navigated the Chesapeake and Delaware Canal many times (Parker R. 7, 8; Conway R. 19, 20; Horsman R. 21). Among other things, Judge Coleman sitting in the District Court found that the master of the CONWAY had had long experience in navigation and a reputation as a careful, successful navigator, that the CONWAY's engineer made a very favorable impression as a witness and no basis was disclosed for attacking his

credibility, that the matter of their licenses had no causal connection with the collision and that there was no fault on the part of the CONWAY (Opinion R. 113, 120, 117). The Court of Appeals affirmed the District Court and this Court should not disturb or review the concurrent judgment of these two courts. See the following cases:

Michael U. Boehmer v. Pennsylvania Railroad Company, 40 S. Ct. 409, 252 U. S. 496, 64 L. Ed. 680;
Just v. Chambers, supra;
Coryell v. Phipps, supra.

The Courts have held that if an officer is competent the mere fact that he holds no license or holds a restricted license should not condemn his vessel in a collision case.

The VANCOUVER, 28 Fed. Case 958, case No. 16838;
The BLUE JACKET, 144 U. S. 371, 12 S. Ct. 711, 36 L. Ed. 469;
The WRESTLER, 144 F. 334 (C.C.A. 2d);
The ALICE M. DREW, 11 F. (2) 376, Aff. 11 F. (2) 377 (C.C.A. 2d);
The CHARLOTTE, 51 F. 455 (Dist. Ct. Md.);
The GRATITUDE v. The EUTAW, 14 F. 479 (E. D. Pa.);
The SAN JUAN, 1927 A.M.C. 384.

III.

THE PETITION SHOULD BE DENIED

We submit that Petitioner has stated no reason for the granting of certiorari and its Petition, therefore, should be denied.

Respectfully submitted,

GEORGE W. P. WHIP,
Counsel for Respondent,
Luke R. Parker.